APPEAL NO. 042518
FILED NOVEMBER 24, 2004

This appeal after remand arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). A contested case hearing (CCH) was held on September 13, 2004. The hearing officer resolved the disputed issues by deciding that the respondent's (claimant) date of maximum medical improvement (MMI) is October 1, 2002, and his impairment rating (IR) is 18%. The appellant (carrier) appealed, arguing that there is no sound basis for changing the MMI date from the previously certified March 26, 2002, to the statutory date of October 1, 2002, and that the 18% IR was not calculated in accordance with the Guides to the Evaluation of Permanent Impairment, fourth edition (1st, 2nd, 3rd, or 4th printing, including corrections and changes as issued by the American Medical Association prior to May 16, 2000) (AMA Guides) and does not represent the claimant's condition as of the date of MMI. The claimant responded, urging affirmance of the hearing officer's determination of his MMI and IR.

DECISION

Affirmed in part and reversed and rendered in part.

The parties stipulated that on _____, the claimant sustained a compensable injury to the lumbar region of his spine and that Dr. B served as the designated doctor. At the previous CCH held in this matter, the parties additionally stipulated that the date of statutory MMI is October 1, 2002.

The claimant's treating doctor initially certified that the claimant reached MMI on January 21, 2002, with a 10% IR under the AMA Guides, based on Diagnosis-Related Estimate (DRE) Lumbosacral Category III. Subsequently, Dr. B examined the claimant and certified that the claimant reached MMI on March 26, 2002, with a 10% IR, based on DRE Lumbosacral Category III. The evidence reflects that the claimant underwent spinal surgeries after October 1, 2002. There is an operative report in evidence dated March 11, 2003, and a second operative report dated July 15, 2003, which describes a revision surgery. In a letter dated September 29, 2003, the treating doctor opined that new calculations of MMI and IR need to be performed in light of the surgeries the claimant has undergone. On November 17, 2003, Dr. B responded to a letter of clarification and changed his opinion of the date the claimant reached MMI due to additional findings and procedures that were performed, and specifically stated that the IR would change since surgery was performed.

In Texas Workers' Compensation Commission Appeal No. 040998-s, decided June 16, 2004, we reversed the hearing officer's determination of MMI and IR and remanded for the hearing officer to advise the designated doctor that the statutory MMI date is October 1, 2002, and specifically tell him that he is to find the MMI date (which can be no later than the statutory date), and determine the IR based on the claimant's

condition as of the MMI date. The letter from the hearing officer to the designated doctor with these instructions was in evidence. In response to this letter, the designated doctor certified that the claimant reached MMI on October 1, 2002, and assessed an IR of 18% based on the range of motion model. The designated doctor assessed 10% under Table 75 Section (II)(E), surgically treated disc lesion with residual; 3% under Table 75 Section (II)(F), for the multiple levels that were operated on, and 2% under Table 75 Section (II)(G) for the second operation to combine for a total of 15%. The designated doctor further assessed 4% for neurological impairment for partial foot drop of the right foot combined with the 15% for a total whole person impairment of 18%.

Section 408.122(c) and 408.125(e) provide that where there is a dispute as to the date of MMI and IR, the report of the Texas Workers' Compensation Commission (Commission)-selected designated doctor is entitled to presumptive weight unless it is contrary to the great weight of the other medical evidence. Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.6(i) (Rule 130.6(i)) provides that the designated doctor's response to a request for clarification is also considered to have presumptive weight as it is part of the designated doctor's opinion. *See also*, Texas Workers' Compensation Commission Appeal No. 013042-s, decided January 17, 2002.

The record reflects continued treatment after the dates both the treating doctor and the designated doctor initially certified MMI, which culminated in more than one surgery. Accordingly, the record supports the designated doctor's amended certification that the claimant reached MMI statutorily on October 1, 2002, and not clinically as previously assessed.

However, we cannot affirm the determination that the claimant's IR is 18% as Dr. B certified. Rule 130.1(c)(3) provides that the "[a]ssignment of an [IR] for the current compensable injury shall be based on the injured employee's condition as of the MMI date considering the medical record and the certifying examination." That rule has been interpreted to mean that the IR shall be based on the condition as of the MMI date and is not to be based on subsequent changes, including surgery. The designated doctor specifically rated surgeries that the claimant had after the date of statutory MMI. While the MMI date may be changed due to a post-MMI change in the injured employee's condition, which would require a new evaluation of the IR, the IR must be based on the injured employee's condition as of the changed MMI date. *See* Texas Workers' Compensation Commission Appeal No. 040313-s, decided April 5, 2004, and Texas Workers' Compensation Commission Appeal No. 040583-s, decided May 3, 2004. The 18% IR cannot be adopted because it is clearly based upon a change in the claimant's condition due to the surgery after statutory MMI. Both Dr. B's initial IR and the treating doctor's assessment of IR are based upon the claimant's condition well before the October 1, 2002, date of MMI and Dr. B's amended IR is based upon the claimant's condition following a post-MMI surgery. There is no IR that is based upon the claimant's condition at the time of statutory MMI. These circumstances would ordinarily result in a remand, *see* Albertson's Inc. v. Ellis, 131 S.W.3d 245, 248-49 (Tex. App.-Fort Worth 2004, pet. denied). However, the Appeals Panel is precluded from another remand by Section 410.203(c). Thus, we reverse the determination that the claimant's

IR is 18% and render a new determination that the claimant's IR cannot be determined. Dr. B, if still qualified to act as the designated doctor, should be asked to determine the claimant's IR as of the date of statutory MMI, before the surgery took place. While that determination will no doubt be a difficult one to make, it is required under Rule 130.1(c)(3). If Dr. B will not assign an IR as of the date of statutory MMI, then the Commission will have to appoint another designated doctor that will certify an IR based upon the claimant's condition on October 1, 2002.

The true corporate name of the insurance carrier is **GREAT AMERICAN INSURANCE COMPANY OF NEW YORK** and the name and address of its registered agent for service of process is

**RAY WILSON**
**9602 CABIN CREEK DRIVE**
**HOUSTON, TEXAS 77064**.

_____
Margaret L. Turner
Appeals Judge

CONCUR:

_____
Thomas A. Knapp
Appeals Judge

_____
Robert W. Potts
Appeals Judge